

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-20863

To be argued by:
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PHILIP MCCRORY,

Petitioner-Appellant,

- against -

J. E. LaVALLEE, Superintendent,
Clinton Correctional Facility,

Respondent-Appellee.

BRIEF FOR APPELLEE

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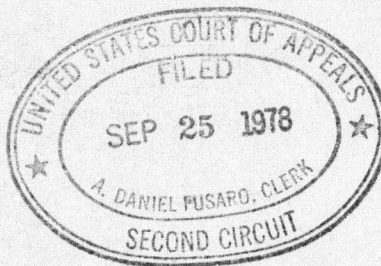


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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-2086

PHILIP MCCRORY,

Petitioner-Appellant,

- against -

J. E. LaVALLEE, Superintendent
Clinton Correctional Facility

Respondent llee.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Carter, J.), dated June 22, 1977, denying petitioner-appellant's (hereinafter "petitioner's") application for a writ of habeas corpus. The District Court granted a certificate of probable cause on July 27, 1977.

Questions Presented

1. Has petitioner suffered any prejudice by the operation of New York's former notice-of-alibi statute, Section 250.20 of the Criminal Procedure Law?
2. Did the state prosecutor intentionally introduce and let stand uncorrected false evidence which materially affected the outcome of the trial?

Statement of Facts

Petitioner is presently incarcerated in the Clinton Correctional Facility at Dannemora, New York, pursuant to a judgment of conviction of the Supreme Court, Bronx County (Klein, J.) rendered on September 24, 1973. Petitioner was convicted, after a trial by jury, of the crimes of Rape in the First Degree, Attempted Rape in the First Degree, Sexual Abuse in the First Degree (two counts), Sodomy in the First Degree (two counts), Robbery in the First Degree (two counts), Burglary in the First Degree (two counts), and Possession of a Weapon as a misdemeanor (two counts).* He was sentenced to consecutive

* These crimes were committed against Miss Sallie McIntyre and Miss Florine Crews in Miss McIntyre's apartment on June 28, 1971. On February 22, 1972, the Bronx County Grand Jury returned a 46 count indictment charging petitioner with multiple counts of rape, sodomy, sexual abuse, robbery, burglary and lesser included offenses in connection with the incident in Miss McIntyre's apartment, and similar crimes committed against four other complainants, two of whom, Etneta Harris and Josette Jackson, claimed to have been sexually attacked later the same morning of the incident herein and testified as rebuttal witnesses at petitioner's trial.

terms having an aggregate minimum term of ten years and an aggregate maximum term of thirty years.

The judgment of conviction was unanimously modified by the Appellate Division, First Department on April 25, 1975, to the extent of reversing the convictions for the crimes of sexual abuse in the first degree and possession of a weapon as a misdemeanor as inclusory concurrent counts of the crimes of sodomy in the first degree and robbery in the first degree, respectively. As modified, petitioner's sentence was reduced to eight years, four months to twenty-five years (47 A D 2d 887, 367 NYS 2d 22). Leave to appeal to the Court of Appeals was denied on October 7, 1975.

State Trial Court Proceedings

The Wade and Huntley Hearing

Petitioner moved to suppress the identification testimony by the victims as well as any statements made by him to the police.

Detective Joseph Basteri of the Bronx Homicide Task Force testified that on January 20, 1972, in the course of his investigation of the case, he visited complainant Sallie McIntyre. At that time she repeated her claim that on June 28, 1971, she had

been raped, sodomized and robbed by a male black who had entered her apartment forcibly while she was asleep. He then showed Miss McIntyre a group of fifteen photographs which all depicted male blacks in their twenties and thirties, and asked her to pick out anyone she recognized. Miss McIntyre selected petitioner's picture from the pile stating "This is the man. I'm quite certain he's the man" (H. 27)*. On January 26, 1972, Det. Basteri showed the same photo array to Miss Crews at her place of business in Philadelphia, Pennsylvania. She also selected the petitioner's picture. Det. Basteri stated that during these proceedings he did not single out or call special attention to petitioner's photograph (H. 3, 11-16).

On January 31, 1972, at approximately 7:00 a.m. Basteri arrested the petitioner in the hallway of his apartment house. After informing the petitioner of the charges, the detective read him his constitutional rights from a card (H. 21). Petitioner indicated that he understood his rights and was willing to answer questions without an attorney present. No questioning occurred until the petitioner had been taken to the police station. There, Basteri confronted the petitioner with the allegations made by

* References to page numbers preceded by the letter "H" are to the transcript of the Wade and Huntley Hearing.

McIntyre and Crews. Petitioner first denied any involvement, stating that "anyone doing those things must be sick" (H. 22). However, after further interrogation, the petitioner asked to speak with his girlfriend, Lorraine Smith. After a twenty-five minute private conversation with Mrs. Smith, petitioner told Detective Basteri, "If you said I did these things, I must have done them I probably did them but I don't remember when I drink." (H. 19-24).

On February 10, 1972, complainants Crews and McIntyre appeared at the Bronx County District Attorney's Office to view a lineup. Each woman was escorted separately to the lineup room by Basteri where they were instructed to look through a one-way mirror and state whether they recognized any of the six men in the lineup. Both Miss Crews and Miss McIntyre identified petitioner as the assailant. Petitioner was represented by a Legal Aid Attorney at the lineup. (H. 16-19)*

* The stenographic transcript of the lineup was made available to defense counsel for cross-examination or as direct evidence in the defense case (H. 19). Petitioner made no use of it.

Philip McCrory testified that at approximately 6:45 a.m. on January 31, 1972, as he was leaving for work, he was arrested at gunpoint by Det. Basteri and three other police officers. Petitioner stated that he was handcuffed and taken back into his apartment which was thoroughly searched by the police officers. Petitioner asserted that he was interrogated all morning by several detectives and was not advised of his rights until Assistant District Attorney Goldstone arrived at the police station. Petitioner stated that he was not advised of the charges regarding Miss McIntyre and Miss Crews until Detective Basteri typed a felony complaint. Petitioner denied making the statement mentioned by Det. Basteri or any other admissions regarding the crimes. (H. 93-99, 105-108).

Petitioner continued to testify that on February 10, 1972, he was taken to the Bronx County District Attorney's Office and placed in a lineup consisting of five other blacks of varying height, build and complexion. Petitioner's attorney was permitted to arrange the lineup in his own manner. Every man in the lineup was asked to wear glasses and recite certain words (H. 101-105).

Petitioner denied speaking to Assistant District Attorney Goldstone at the station house concerning any rape charges (H. 110-113).

Lorraine Smith testified that she was living with the petitioner at the time of his arrest. Mrs. Smith stated that the police officers brought the petitioner into his apartment and remained in the apartment for about twenty-five minutes during which time they conducted a search. The witness said she did not hear anyone advise the petitioner of his rights or tell him why he was being arrested. At the station house, she recalls Detective Basteri asking her to persuade the petitioner to seek psychiatric help and the petitioner denying participation in the crimes (H. 76-83).

On cross-examination, Mrs. Smith admitted that she and petitioner were in separate rooms during most of the events in the apartment and was for part of that time engaged in conversation with police officers. Mrs. Smith also conceded that she was isolated from petitioner at the station house except for a short conversation and was therefore unaware of whether any warnings or statements were given at that time (H. 83-87, 91-92).*

* Petitioner had the opportunity to call the complainants at the hearing, but failed to do so despite the fact that the prosecutor provided defense counsel with the Philadelphia addresses and phone numbers of the complainants and the court granted two adjournments to defense counsel to secure them.

The Decision After the Suppression Hearing

The state court (Loguen, J.) denied petitioner's motion to suppress his statement to Detective Basteri and the in-court and out-of-court identifications of Miss McIntyre and Miss Crews, stating as follows:

"It's the finding of the Court on the credible evidence that the Detective Basteri arrested the defendant on January 31, 1971 [sic] sometime around seven a.m. in the hallway outside of the defendant's apartment. He took the defendant into the apartment and that he advised the defendant of his rights.

"It is the finding of the Court that the defendant indicated that he understood each right. Apparently, this took a short period of time.

"It's a further finding that the detective took the defendant to the station and again advised the defendant of his rights.

"It's the finding of the Court that Detective Basteri did not strike or threaten the defendant nor did anyone else strike or threaten the defendant with the knowledge of Detective Basteri.

"It is the finding of the Court that the defendant made the statement, spoke to a girlfriend and then made a second statement.

"Under all of the facts and circumstances before the court, it is the finding of the Court beyond a reasonable doubt and by clear and convincing evidence that the defendant was given the so-called Miranda Warnings as required by law and that he knowingly and intelligently waived his constitutional rights.

"It is the further finding of the Court that the admissions given were voluntarily made.

* * *

"[U]pon a hearing of a Wade-Gilbert motion the Court finds the facts as follows:

"On January the 20th, 1972, Detective Basteri and his partner went to the home of Sally McIntyre, one of the complainants. She was questioned about an incident she reported on June the 28th, 1971 involving the crimes of rape, robbery and sodomy.

"The complainant was asked to identify her assailant, if possible, from fifteen photographs presented to her. Miss McIntyre picked out the photograph of the defendant and exclaimed, 'This is the man, I'm quite certain he's the man.' The photographs were presented in random order with the defendant's picture somewhere in the middle. The Court has inspected the photographs and finds that there were no suggestive notations on the photographs nor were the pictures inherently prejudicial to the defendant.

"Detective Basteri testified that a similar procedure was followed with the other complainant Miss Crews and that the defendant was identified

by her as well. Both photo identifications occurred prior to the arrest of the defendant.

"On February the 10th, 1972 the defendant already under arrest and represented by counsel, was placed in a line-up with five other men. All the persons in the line-up were black, from twenty to thirty years of age and middle build. None of the participants were shown to possess characteristics markedly distinguishable from the defendant. The complainants viewed the line-up separately. In each case, the defendant was selected as the perpetrator.

"Under the totality of the circumstances the Court finds that the procedures followed were not unduly suggestive so as to give rise to any substantial danger of misidentification. The identifications were absent any taint from illegal identification procedures. Accordingly, the motion is denied." (H. 139-140, 144-145).

The Trial*

The People's Case

On the weekend of June 26 and 27, 1971, Miss Crews was visiting her friend Sallie McIntyre who lived in a four room apartment in the Bronx. On Sunday, June 27, the women, sleeping in a double bed since only one bedroom was furnished, fell asleep around 11:30 p.m. (T. 54-57, 75-83, 127-128, 140-142, 147-151).**

Suddenly, both women were awakened by an intruder lying across them and brandishing a knife. While placing the blade at the necks of the women, petitioner warned, "If either one of you makes a move, the other one of you will get hurt." (T. 58, 129). Petitioner then stated, "I'm going to make love to both of you." (T. 59, 156). Petitioner ordered the women to turn over and remove their clothes (T. 57-59, 65, 87-89, 129-131, 154-156).

* On December 28, 1972, the Honorable Hilda Schwartz granted petitioner's motion for a severance and ordered four separate trials for the four different complainants. The first twenty counts of the indictment involving Miss McIntyre and Miss Crews were permitted to be tried together.

** References to page numbers preceded by the letter "T" are to the trial transcript.

After the women disrobed, petitioner, still dressed and holding the knife, ordered McIntyre to perform oral sex with her friend while he attempted to insert his penis into McIntyre's vagina. This was repeated with the women in reverse positions. Petitioner made each of the women perform fellatio and he had oral sex with them. He threatened to have anal intercourse with both women, but actually penetrated their rectums with his fingers. Petitioner also had conventional intercourse with both women. He bit McIntyre on the vagina and Crews on the back and buttocks. After approximately two hours of sexual activity, petitioner, still unable to reach orgasm, ordered the women to lie on their stomachs and then masturbated until he ejaculated over their backs, necks and heads (T. 59-65, 68, 91-96, 102, 120-21, 131-33, 158-64).

When petitioner had finished masturbating, he turned on the bedroom light to locate the victims' pocketbooks, Producing a small silver pistol, he told the women, "Don't make no noise. Because I'll shoot" (T. 69). Petitioner then rummaged through the apartment, taking money from the women's pocketbooks, a watch, ring and two Polaroid cameras. Petitioner then took Miss McIntyre, still nude, out into the hallway and warned her, "Don't make a move until I get out" (T. 70). After petitioner left, the women immediately called the police (T. 66-70, 98-99, 134-36, 165-69).

When the police arrived shortly thereafter, the women told the officers that they had been raped and robbed. Miss McIntyre provided the police with an accurate description of the petitioner. After questioning the women for about ten minutes, the police drove them to Morrisania Hospital where they were given rectal and vaginal examinations (T. 64, 70-71, 73, 100-06, 117-18, 121-22, 137, 169-74, 189).

On January 20, 1972, Detective Basteri visited Miss McIntyre at her home and she gave him a description of the culprit. Miss Crews also gave a description of the assailant several days later. On January 31, 1972, at approximately 7:00 a.m., petitioner was arrested by Detective Basteri and four other officers in the hallway of his apartment. The petitioner was handcuffed, led back into his apartment and advised of his rights, and then taken to the police station. Lorraine Smith who was present in petitioner's apartment was also taken to the precinct house. After their arrival, petitioner was again advised of his constitutional rights and then questioned about the attacks upon the complainants. The petitioner first denied participation, however, when Detective Basteri suggested that such a person should receive treatment, petitioner asked to speak with Mrs. Smith. After a thirty minute conversation

with Mrs. Smith, the petitioner told Detective Basteri, "Well, if they said I did it, I must have done it. I don't remember (T. 203, 196-204, 207-13, 220-21).

On February 10, 1972, petitioner appeared in a lineup conducted at the District Attorney's Office. While the complainants stated that petitioner sported a mustache and goatee on the night of the crime and did in fact have such hair when arrested, petitioner was clean shaven at the lineup. Nevertheless, McIntyre and Crews, viewing separately, positively identified petitioner as the assailant. They also identified him at trial (T. 66, 71-73, 115-16, 123, 178-83, 188, 192, 206, 218).

The Defense

Lorraine Smith testified that she was living with the petitioner in his apartment at the time of the crimes as well as on the day of his arrest. She remembered that on Sunday afternoon, June 27, 1971, she and the petitioner visited her friend, Denise Robinson, in St. Albans, Queens. From there, they went with Miss

Robinson and her daughter, Shannon, to dinner and then, by subway and bus, to Times Square to see the movie, Love Story. When the movie ended around 10:00 p.m., they returned to St. Albans, arriving about 12:00 p.m., where they spent the night, going to bed between 12:30 and 1:20 a.m. Instead of going to work the next day, they awoke around 6:00 a.m. and went shopping in Manhattan and then to Coney Island for the rest of the day (T. 226-28, 231-237).

While Mrs. Smith stated that it was March, 1972 when she first realized that the petitioner had spent the night in question with her, she admitted that she did not tell anyone this story until the following summer. Approximately two weeks before trial, she was interviewed by Assistant District Attorney Goldstone at his office.* When confronted with transcribed statements from that interview in which she stated that the movie was over at 8:30 p.m. and that they arrived in St. Albans at about 9:30 p.m., she replied that she had been confused earlier and that her statements on direct examination at trial were accurate. She recalled that the movie, Love Story, was the only feature playing at the theatre (T. 246, 257, 270-71, 275-79, 283-85).

* Approximately seven months prior to trial, petitioner served a notice upon the District Attorney, as required by CPL § 250.20, listing the names and addresses of his alibi witnesses, Lorraine Smith and Denise Robinson. Both witnesses were interviewed at the District Attorney's Office before trial.

Denise Robinson testified that on June 27, 1971, the petitioner and Mrs. Smith visited her in St. Albans. After dinner, she and her daughter went to see Love Story in Manhattan with petitioner and Mrs. Smith. When the movie was over, they returned to St. Albans, arriving at about 11:00 or 11:30 p.m. The petitioner and Mrs. Smith spent the night and left early the next morning. Miss Robinson conceded on cross-examination that while she first realized in March or April, 1972 that petitioner was at her home when the crimes occurred, she did not speak to petitioner's counsel until September, 1972, and never informed the police of this alibi. Mrs. Smith visited the witness just before the investigators from the Legal Aid Society visited her in September, 1972. One of the investigators gave Miss Robinson's daughter a five dollar bill for her birthday. Miss Robinson also stated that Love Story was the only feature playing at the theatre that night. (T. 332-35, 339-46, 356-58).

Doctor Antaine Moreau, a physician specializing in obstetrics and gynecology, testified that he examined Miss Crews and Miss McIntyre at Morrisania Hospital on June 28, 1971.

After examining their vaginal and rectal areas as well as other parts of the body, he found no evidence of violence or traces of semen (T. 372-77). On cross-examination, Dr. Moreau conceded that his testimony was based solely upon what appeared on the patients' charts and that if semen appeared on parts of the body other than the vaginal area, this fact would not necessarily appear on the chart. The doctor also admitted that where a mature woman is raped without resisting, bruises might not be evident (T. 378-85).

The People's Rebuttal

Alex Fodor, Assistant Booker for Paramount Pictures, testified that on June 27, 1971, his employer was the sole distributor of the movie Love Story in New York City. His records indicated that on June 27, 1971 the movie was part of a double feature at the Apollo 42nd Street Theatre and that this theatre was the only movie house within a five block radius of 42nd Street and 8th Avenue playing that movie (T. 387-88).

Louis Spano, Assistant Manager of the Apollo 42nd Street Theater, testified that the double feature of Love Story and Violent Four were playing on June 27, 1971 and lasted 3 hours and

15 minutes. Advertisements for that date indicated that only Love Story was playing (T. 389-95).

Etneta Harris testified that at approximately 4:00 or 5:00 a.m. on June 28, 1978, she saw the petitioner in the hallway of her building on Grant Avenue in the Bronx. Miss Harris stated that she was with her friend, Josette Jackson, and the petitioner for a couple of hours, that she was able to get a good look at him and was sure of the date "[b]ecause of what happened" (T. 396-98).

Josette Jackson testified that she was with Etneta Harris at around 4:30 a.m. on June 27, 1971 when she encountered the petitioner in the hallway of Miss Harris' apartment building. Miss Jackson stated that she was with the petitioner for over an hour and was absolutely certain that it was the petitioner whom she saw (T. 412-15).

Motion to Vacate Judgment of Conviction

On January 8, 1974, petitioner moved for an order vacating his conviction on the ground that New York's notice-of-alibi statute was unconstitutional under Wardius v. Oregon, 412

U.S. 470 (1973). In denying the motion on January 24, 1974, the Supreme Court (Bernstein, J.) found that the petitioner was not prejudiced by the operation of the statute since he was permitted to present his alibi witnesses at trial. Therefore, "there is no constitutional infirmity inherent in his trial".

Motion for a New Trial

Petitioner moved for a new trial based upon newly discovered evidence during the pendency of his appeal.* Petitioner claimed that the testimony elicited by the prosecutor from the rebuttal witnesses that the movie Love Story was only playing at the Apollo 42nd Street Theatre in the Times Square area as part of a double feature was false and knowingly used by the prosecutor. It was determined later that Love Story was also playing as a single feature at the Agee II theatre on 48th Street and Seventh Avenue. On June 10, 1975, Justice Alvin F. Klein denied the motion for a new trial. On August 7, 1975, the Appellate Division, First Department denied leave to appeal.

The Federal Habeas Corpus Petition

Petitioner presented six issues to the District Court including his notice-of-alibi claim and use of false evidence

* It is interesting to note that the "newly discovered evidence" was discovered in August 1973, but not used by petitioner until his motion for a new trial in 1975.

claim.* In denying the petition in all respects, the District Court rejected petitioner's notice-of-alibi claim despite finding that the statute was unconstitutional. The Court remarked:

"Had petitioner not been allowed to present his alibi defense because of non-compliance with the statute, there could be little doubt that any conviction reached by the jury would be void. Wardius, supra. Yet here petitioner was in no way precluded at trial from setting forth his alibi. Thus, unlike the situation in Wardius, the only possible prejudice petitioner can point to by operation of the alibi notice statute in this case is the lack, if any, of adequate time to prepare cross-examination of the state's rebuttal witnesses. If the petitioner can show no such prejudice, he can claim no due process deprivation. See Green v. Fogg, 422 F. Supp. 1034 (S.D.N.Y. 1976).

"Petitioner has not made the requisite showing here, and an examination of the record of petitioner's trial indicates that he could not possibly do so. The rebuttal testimony of all four state witnesses was relatively straight forward and little preparation was necessary for proper cross-examination. Petitioner could have, if he had felt any need, requested an adjournment at the time the state put forth its rebuttal witnesses. He did not do so and from this failure the court may confidently conclude that he deemed no additional preparation necessary. (footnote omitted)

"Indeed, as far as witnesses Harris and Jackson are concerned, it is evident that cross-examination of them was limited

* Since the petitioner has raised these same claims in the State trial and appellate courts, it appears that he has satisfied the strict exhaustion requirements enunciated by this Court in Wilson v. Fogg, 571 F. 2d 91 (2d Cir. 1978).

because of the fear that any deeper probing might lead the jury to suspect that petitioner had also been accused of wrongdoing against these witnesses.
(footnote omitted)

"It is not quite so clear why the cross-examination of witnesses Spano and Fodor -- employees of the Apollo Theatre -- was as limited as it was. However, petitioner at no point indicated any surprise that they were called; nor did he ever indicate in any way that he was unprepared for cross-examination. Although a state may not subject a defendant to 'the hazard of surprise concerning the very pieces of evidence which he disclosed to the State,' Wardius, supra, 412 U.S. at 476, due process does not require that a defendant be made aware of the state's rebuttal evidence prior to the introduction of his alibi. See Green v. Fogg, supra. Indeed, such a rule would in many instances simply allow a defendant to doctor his alibi to fit the state's rebuttal case. Considering this, and given the failure of petitioner to indicate any prejudice until after the trial was completed, any surprise the testimony of Spano and Fodor may have caused petitioner does not rise to the level of such unfairness as to render his conviction void." (App. Exhibit B. pp. 4-5).

With respect to the petitioner's claim that the prosecutor intentionally used false testimony, the Court found:

"On the basis of an affidavit and several letters, petitioner attempts to show that the state intentionally introduced false evidence that the movie "Love Story" played in only one theatre in the Times Square area on June 28,

1971. (footnote omitted) Petitioner argues that the use of this false evidence had a material effect on the jury, and therefore his conviction should be voided. However, all petitioner has shown is that the state's witnesses testified incorrectly. He has presented the court with no evidence whatsoever that the incorrect testimony was given deliberately with the contrivance of the state, or that the state knew the testimony was false yet allowed it to go uncorrected. Could petitioner produce such evidence he would have a strong claim, Miller v. Pate, 386 U.S. 1 (1967), assuming that he could also show that the testimony involved had materially affected his conviction.

"In the absence of such evidence, petitioner's claim can succeed only if he can show that the evidence he has newly discovered is of sufficient importance to require a new trial. In this Circuit, as in others, a new trial will be granted on the basis of new evidence discovered after trial only where the evidence could not have been discovered earlier by the exercise of due diligence, and where the evidence is so material that it would likely have produced a different verdict had it been available at trial. See United States v. Bermudez, 526 F. 2d 89 (2d Cir. 1975); United States v. Slutsky, 514 F. 2d 1222 (2d Cir. 1975); United States v. Parness, 408 F. Supp. 440 (S.D.N.Y. 1975).

"Petitioner's claim meets neither of these prerequisites for relief. There appears to be no reason why petitioner could not with due diligence have discovered earlier the evidence he now puts forth.

Furthermore, the evidence of petitioner's guilt presented at trial was so overwhelming that even had this new evidence been part of the trial record, it is extremely unlikely that the outcome would have been any different. This contention is therefore rejected." (App. Exhibit B, pp. 5-6)

POINT I

PETITIONER SUFFERED NO PREJUDICE
BY OPERATION OF NEW YORK'S FORMER
NOTICE-OF-ALIBI STATUTE.

In Wardius v. Oregon, 412 U.S. 470 (1973), the Supreme Court held Oregon's notice-of-alibi statute unconstitutional on the grounds that it failed to afford reciprocal discovery benefits to criminal defendants, and reversed the defendant's conviction because his refusal to furnish a list of alibi witnesses had resulted in an order precluding those witnesses from testifying at trial.* In remarking that the constitutionality of such rules "might depend on 'whether the defendant enjoys reciprocal discovery against the State'"

* Wardius was decided on June 11, 1973, approximately one month before the commencement of petitioner's trial.

(412 U.S. at 471), the Court stated:

"It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning the refutation of the very pieces of evidence which he disclosed to the state." 412 U.S. at 476.

The Court in Wardius was quick to point out, however, that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but Cf. Brady v. Maryland, 373 U.S. 831 (1963)", and does not require a state to adopt a reciprocal discovery statute. 412 U.S. at 474. The defendant in Wardius, unlike the petitioner here, was granted a new trial because of the "substantial possibility" that the preclusion of his alibi witnesses "infected the verdict". 412 U.S. at 479.

Approximately six months after Wardius, the New York Court of Appeals in People v. Bush, 33 N Y 2d 921 (1973), cert denied, 419 U.S. 848 (1974) had occasion to review the notice-of-alibi statute, Section 295-L of the Code of Criminal Procedure,

in light of the Supreme Court's decision in Wardius.*

The Court declared the former statute unconstitutional since there was no "significant difference" between § 295-L and the Oregon provision. 33 N Y 2d at 923. The Court further found that the invalidity of the statute would apply prospectively to cases in which the trial commenced after June 11, 1973 (the date of the Wardius decision), but would not apply to cases where trial began prior to that date unless "the rule was applied to prevent a defendant from introducing testimony to support his alibi defense as a sanction for his failure to comply with the notice-of-alibi statute". People v. Bush, supra at 923. The trial in Bush had predated Wardius.

While striking down CCP § 295-L as unconstitutional, the Court affirmed Bush's conviction because he had provided the names of his alibi witnesses and no exclusionary sanctions were applied. The operation of the statute "did not go to 'the very integrity of the fact-finding process'; rather it touched

* Section 295-L of the Code of Criminal Procedure was the predecessor section to §250.20 of the Criminal Procedure Law, effective September 1, 1971. The only noteworthy distinction between the Code section and its successor is that the Code section required service by the People of the alibi notice "not less than eight days before the case is moved for trial" and the CPL section allows such service "at any time before trial". C.P.L. § 250.20 was amended to comply with Bush, L. 1974, c. 420 § 1, eff. May 23, 1974.

on procedural fairness to the defendant" People v. Bush, supra at 923. Where defendants were prevented from presenting alibi testimony due to their failure to comply with the notice-of-alibi provision in former CPL § 250.20, the state courts have not been reluctant to invalidate the conviction. See People v. Dalton, 38 N Y 2d 222 (1976); People v. Morales, 37 N Y 2d 262 (1975).

In our case, as in People v. Bush, supra, petitioner's alibi witnesses were permitted to testify at trial. Therefore, the only possible adverse effect of the notice-of-alibi statute was to permit the State's rebuttal witnesses to testify without advance disclosure of their identities to the petitioner. As the District Court correctly found, petitioner failed to make any showing that the lack of advance disclosure of the rebuttal witnesses prejudiced his case. Nor has petitioner demonstrated how his claim of prejudice could approach constitutional significance. On the contrary, a review of the record indicates that no prejudice could possibly exist in the instant case (App. Exh. B p. 4).

The testimony of the state's four rebuttal witnesses was straightforward, clearly foreseeable and needed little preparation to conduct a proper cross-examination. Surely, petitioner could not have been surprised by the testimony of Miss Harris and Miss Jackson. Both women had identified the petitioner at the police lineup. Petitioner also was granted access to the transcript of the lineup before trial in an order of the Bronx County Supreme Court (Bloom, J.) dated June 6, 1973. Petitioner knew both complainants because he had their cases severed from the instant one and was aware that they accused him of several crimes occurring in the Bronx the same morning as the crimes committed against McIntyre and Crews. The indictment itself provided ample notice that they possessed information contradictory to his alibi. The limited cross-examination of Harris and Jackson is understandable in view of the possible danger of revealing the wrongdoing committed by petitioner against them.

Rebuttal witnesses Fodor and Spano both testified to limited collateral matters of which neither had an independent recollection. Their testimony simply related to what movie was

playing in a certain theatre on a particular night. Since their testimony was based on documentary notations, it is hard to imagine how advance notice of their names and addresses would have resulted in more effective cross-examination. Petitioner at no time indicated that he was surprised by their testimony or unprepared for their cross-examination. It is extremely unlikely that if the petitioner had indeed seen the movie "Love Story" in the Times Square area, he would not have objected or asked for a continuance when he heard the rebuttal testimony that the Apollo Theatre on 42nd Street was the only theatre in Times Square playing Love Story on the night in question. Nor did petitioner's counsel ever challenge the rebuttal testimony or suggest to the jury that petitioner might have seen the movie at another theatre more than five blocks away from the Apollo Theatre in his cross-examination or summation. No evidence was proffered by the petitioner that he might have seen the movie outside the 40-42nd Street area of Times Square (App. Exh. B. p. 4 fn. 5). Petitioner's belated claim of prejudice casts suspicion on the veracity of his claim.

Similarly, in Green v. Fogg, 422 F. Supp. 1034 (S.D.N.Y. 1976), the petitioner provided the prosecutor with the names of his alibi witnesses and was permitted to present his alibi defense. In denying petitioner's challenge to New York's notice-of-alibi statute under Wardius, the Court found at 1036:

"Where, as here, a defendant has failed to request an adjournment at the introduction of unexpected rebuttal evidence, and, more importantly, where that rebuttal evidence involves solely scientific facts as immutable as a weather report, the Court must conclude that the error, if there was any at all, was not prejudicial."

It is significant to note that at no time during or after the testimony of the rebuttal witnesses did the petitioner object or request a continuance. One could reasonably assume from petitioner's failure to seek an adjournment that he was satisfied with his cross-examination and concluded that no additional preparation was necessary.* The failure to request a continuance seriously undermines petitioner's claim of prejudice. See Weatherford v. Bursey, 429 U.S. 545 (1977). In Weatherford v. Bursey, supra, the Court in response to the

* Petitioner could have presented his own evidence in rebuttal to the People's rebuttal evidence pursuant to CPL § 260.30(7), but failed to do so.

defendant's contention that he was unable to counter the "devastating testimony" of a government witness due to the unethical conduct of the prosecutor, the Court replied that "the disadvantage was no more than exists in any case where the Government presents very damaging evidence that was not anticipated". 429 U.S. at 561. The rebuttal testimony here was no where near as damaging as the testimony in Weatherford and was clearly anticipated. Furthermore, petitioner's failure to request a continuance or object in any manner constitutes a waiver that precludes his assertion of the claim in a habeas proceeding. See Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Francis v. Henderson, 425 U.S. 536 (1976); United States v. Hart, 407 F. 2d 1087, 1089 (2d Cir.), cert denied, 395 U.S. 916 (1969); United States ex rel. Satz v. Mancusi, 414 F. 2d 90, 92 (2d Cir. 1969).

The Court in Wardius took special note of the fact that not only was Oregon's notice-of-alibi statute lacking reciprocal provisions, but also Oregon's entire criminal code was "almost completely lacking in pretrial discovery procedures", even denying defendants with a bill of particulars. 412 U.S. at 475.

While "there is no general constitutional right to discovery in a criminal case", (Weatherford v. Bursey, supra at 559), New York provides liberal discovery for defendants in CPL §§ 200.90 and 240.20.* Although the petitioner filed several discovery motions including a demand for a Bill of Particulars and a motion for the transcript of the lineup and the names and addresses of the Grand Jury witnesses, he did not request a list of the rebuttal witnesses. Since petitioner failed to avail himself of the liberal discovery devices available to him at the time of the trial, he should be foreclosed from arguing that he was prejudiced by the denial of reciprocal discovery.**

Thus, petitioner's claim that his trial was "infected" by the operation of New York's notice-of-alibi statute is totally unsupported by the record in this case. In fact, the record demonstrates that there was absolutely no prejudice to the petitioner by CPL § 250.20.

* Several state courts have construed CPL § 240.20 to authorize reciprocal discovery of alibi and rebuttal witnesses. See People v. Carter, 76 Misc. 2d 543 (Nassau Co. Ct., 1973); People v. Collins, 75 Misc. 2d 535, 541 (Nassau Co. Ct., 1973); People v. Guthman, 76 Misc. 2d 572 (Nassau Co. Ct., 1973); People v. Elliot, 74 Misc. 2d 974 (S. Ct., Kings Co., 1973).

** On appeal to this Court in Mayer v. Moeykens, 373 F. Supp. 649 (D. Vt. 1973) (Waterman, J.), affd, 494 F. 2d 855 (2d Cir.), cert. den. 417 U.S. 926 (1974), the Wardius claim challenging Vermont's non-reciprocal notice-of-alibi statute was dropped at oral argument because of Vermont's liberal discovery rules.

POINT II

THE STATE PROSECUTOR DID NOT SOLICIT,
INTRODUCE OR LET STAND UNCORRECTED ANY
FALSE EVIDENCE DURING PETITIONER'S TRIAL.

It is well settled that a prosecutor who knowingly uses false testimony to obtain a conviction or fails to correct testimony he knows to be untrue violates the defendant's right to due process. Napue v. Illinois, 360 U.S. 264 (1959); Miller v. Pate, 386 U.S. 1 (1966); Giglio v. United States, 405 U.S. 150 (1972).

Petitioner's claim that the prosecutor intentionally allowed false testimony to stand uncorrected to the effect that the movie "Love Story" was only playing at one theatre in the Times Square area and as part of a double feature was properly rejected by the Court below. The District Court found that the petitioner "presented the court with no evidence whatsoever that the incorrect testimony was given deliberately with the contrivance of the state, or that the state knew the testimony was false yet allowed it to go uncorrected". (Emphasis added) (App. Exh. B. p. 5)

Petitioner's claim that the prosecutor knew "Love Story" was playing at more than one theatre in the Times Square area rests upon sheer speculation. Without basis in the record, petitioner is quick to impute this knowledge to the prosecutor, who after being told by Fodor that "Love Story" was only playing at the Apollo 42nd Street Theatre in the Times Square area had no reason to doubt him or investigate further. Petitioner, on the other hand, who failed to convince the jury of the credibility of his alibi, apparently was not even confident enough in his own story to challenge the disputed testimony at trial or to seek an adjournment to secure evidence which would have been easily available to rebut Fodor's testimony. While the prosecutor had no reason to go beyond Fodor's testimony, petitioner had every reason to if his alibi was, in fact, true. Petitioner's failure to secure evidence to rebut Fodor's testimony lends credence to the theory that petitioner never saw "Love Story" on the night in question and had no reason to doubt or question Fodor's testimony at trial. It was petitioner's belated discovery after trial that "Love Story" was playing at two theatres in the Times Square area which implanted the idea for his motion for a new trial two years after his conviction.

Assuming arguendo that the prosecutor premitted false testimony to go uncorrected, petitioner would still have to demonstrate that the disputed testimony materially affected his conviction. In United States v. Pfingst, 490 F. 2d 262, 279 (2d Cir. 1973), cert. den., 417 U.S. 919 (1974), the Court, in rejecting claims that the prosecutor solicited false testimony and failed to correct a false response from a government witness, stated:

"A finding of negligence of course does not eliminate the injustice which will often arise when false testimony stands uncorrected. Nevertheless, in Giglio the Court reiterated that, in the absence of bad faith, 'a finding of materiality of the evidence is required under Brady. . . ' Giglio v. United States, supra, 405 U.S. at 154, 92 S. Ct. at 766. And the Court added that 'a new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ' Napue, supra at 271 (of 360 U.S., 55 S. Ct. 340)'. Id."

The disputed testimony here is by no means material or can it reasonably be argued to have affected the outcome of the trial. Firstly, petitioner's presence at a particular location several hours before the heinous acts were committed does not exculpate the petitioner. Secondly, the thrust of the "newly

discovered evidence" contradicts the petitioner's alibi evidence at trial and supports the state's rebuttal evidence. Mrs. Smith testified that she went to a movie "a couple of blocks" from the subway (T. 271). Mrs. Robinson stated that they walked "two blocks . . . It wasn't too long" (T. 351). The State's rebuttal testimony stated that there was only one theatre showing "Love Story" within a five-block radius of 42nd Street and Eighth Avenue subway stop (T. 388). Petitioner's "newly discovered evidence" discloses that "Love Story" was playing at a theatre on 48th Street and Seventh Avenue which is not within a five-block radius of 42nd Street and Eighth Avenue. Thus, petitioner's own alibi witnesses contradict his assertion that he saw a movie as far north as 48th Street and support the State's contention that petitioner saw the advertisement for "Love Story" playing at the Apollo 42nd Theatre in the newspaper and tailored his alibi accordingly.

Petitioner has also failed to demonstrate that the "newly discovered evidence" is of "sufficient importance" to require a new trial (App. Exh. B, p. 6). In order for a defendant to succeed on a motion for a new trial, he must show "(1) that the evidence was discovered after trial, (2) that it

could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict". (Citation ommitted). United States v. Slutsky, 514 F. 2d 1222, 1225 (2d Cir. 1975); See United States v. Bermudez, 526 F. 2d 89 (2d Cir. 1975); United States v. Rosner, 516 F. 2d 269, 272 (2d Cir. 1975); United States v. Kahn, 472 F. 2d 272, 287 (2d Cir.) cert. den., 411 U.S. 982 (1973); United States v. Parness, 408 F. Supp. 440, 443 (S.D.N.Y. 1975). The burden of proof on such motions is strict since they "are not held in great favor". United States v. Catalano, 491 F. 2d 268, 274 (2d Cir.), cert. den., 419 U.S. 825 (1974).

While petitioner may be able to show that he discovered the new evidence after trial, he woefully fails to satisfy the other prerequisites. There is no reason why the petitioner could not, with due diligence, have discovered the evidence earlier. A simple check of the theatres in the Times Square area at the time of trial would have revealed the evidence now put forth. More importantly, in view of the overwhelming evidence of the petitioner's

guilt including the positive eyewitness identifications, the new evidence would have had no perceptible impact on the outcome of the trial.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DENYING THE PETITION IN ALL RESPECTS
SHOULD BE AFFIRMED.

Dated: New York, New York
September 22, 1978

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Kevin J. McKay, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for Respondent - Appellee herein. On the 25th day of September, 1978, he served the annexed upon the following named person :

David Blackstone, Esq.
401 Broadway
New York, N.Y. 10013

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Kevin J. McKay

Sworn to before me this
25th day of September, 1978

Walter J. [Signature]
Assistant Attorney General
of the State of New York